

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 2-93:

FLORENCE-CARLTON CLASSIFIED EMPLOYEES
ASSOCIATION, MEA/NEA,
Petitioner/Appellant,

- vs -

FLORENCE-CARLTON HIGH SCHOOL &
ELEMENTARY DISTRICT NO. 15-6,
Respondent.

INTERLOCUTORY
ORDER

* * * * *

The Findings of Fact; Conclusions of Law; and Order was issued by Gordon R. Bruce, Hearing Examiner, dated November 22, 1993.

Petitioner/Appellant's Exceptions to Findings of Fact; Conclusions of Law; and Recommended Order were filed by its Attorney Karl J. Englund on December 9, 1993.

Oral argument was scheduled before the Board of Personnel appeals at the March 30, 1994 meeting. Karl J. Englund, Attorney, submitted argument on behalf of Appellants. Dr. Ernest Jean submitted argument on behalf of Respondent.

After reviewing the record and considering the briefs and oral arguments, the Board order as follows:

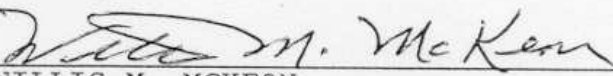
1. IT IS ORDERED that the Findings of Fact; Conclusions of Law; and Recommended Order of the Hearing Examiner is vacated and the case remanded to the Hearing Examiner to conduct a new hearing.

2. IT IS ORDERED that the burden of proof be placed on the Respondent to prove the newly created position is a confidential employee as defined in Section 30-31-103(3) MCA, and that the utilization of this proper burden of proof be reflected in the proposed order.

DATED this 15th day of June, 1994.

BOARD OF PERSONNEL APPEALS

By


WILLIS M. MCKEON
CHAIRMAN

Board members Henry and Schneider concur.

Board member Talcott dissenting.

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STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 2-93:

FLORENCE - CARLTON CLASSIFIED)	
EMPLOYEE ASSOCIATION, MEA/NEA,)	
Petitioner,)	
-vs-)	FINDINGS OF FACT;
	CONCLUSIONS OF LAW;
	AND
FLORENCE - CARLTON HIGH SCHOOL)	RECOMMENDED ORDER
& ELEMENTARY DISTRICT 15-6,)	
Respondent.)	

* * * * *

I. INTRODUCTION

A formal hearing in the above entitled matter was conducted by telephone on August 19, 1993. The hearing was conducted under authority of Section 39-31-207, MCA, pursuant to ARM 24.26.630, and in accordance with the Montana Administrative Procedure Act, Title 2, Chapter 4 (MAPA). The Petitioner was represented by Karl J. England, Attorney at Law. The Respondent was represented by Don D. Klepper, Ph.D. Witnesses included Sandy Bushek, UniServ Director, MEA/NEA; Dr. William Ernest Jean, Superintendent; Eleanor McCullough, association member, and Debbie Michalik, incumbent in the Personnel/Labor Relations Assistant-Secretary/Receptionist position.

II. BACKGROUND

On September 30, 1992, the Petitioner filed its petition for Unit Clarification with this Board. Petitioner alleges that a newly created position of "Personnel/Labor Relations Assistant-Secretary/Receptionist" should be included within the existing classified employee bargaining unit. Petitioner argues that the

Respondent attempts to circumvent the bargaining unit by creating a new position purportedly performing as a confidential labor relations employee as defined in Section 39-31-103 (3), MCA, (1993).

III. ISSUE

Whether the position of Personnel/Labor Relations Assistant-Secretary/Receptionist should be included in the existing bargaining unit.

III. FINDINGS OF FACT

1. The Florence-Carlton Classified Employee Association, MEA/NEA, (hereinafter "Association") is the labor organization which represents certain individuals employed by the Florence-Carlton High School & Elementary District, 15-6 (hereinafter "School District"). (Exhibit J-1)

2. In the 1987 Agreement between the Board Of Trustees of School District 15-6 and the Association, the parties agreed that the Secretary to the superintendent as related to labor relations was that position held by incumbent, Dorothy Rhodes, which was excluded from the Association unit consisting of approximately fourteen (14) members. In 1987 the incumbent performed confidential labor relation duties for the Superintendent, and continues to act in that capacity for the Respondent, as revealed by her initials appearing on Board documents. (Testimony Sandy Bushek and Eleanor McCullough) (see Exhibit Nos. 2, 3, 4, & 5)

3. A new agreement was initiated between the Association and the School District effective July 1, 1992 through June 30, 1994. (See Exhibit No. 1)

1 4. In the Minutes of Board Meeting held July 9, 1991, it was
2 noted that Debbie Michalik had been hired as the full-time
3 temporary district "secretary-receptionist." (Exh. 2)

4 5. In the Minutes of Board Meeting held June 9, 1992, it was
5 noted as follows:

6 Mr. Moore moved to offer Debbie Michalik a 10 month
7 position to be evaluated in one year. Mr. Zachariasen
8 seconded. Mr. Moore amended his motion to read work the
9 same amount of time as the other secretaries. The motion
passed with a vote of 4-1, with Mrs. Shughart casting the
opposing vote. (Exh. 3)

10 6. The position description for the position held by
11 incumbent, Debbie Michalik, lists 9 responsibilities under Section
12 A - Personnel/Labor Relations Assistant and 8 responsibilities
13 under Section B - Receptionist/Secretary. Among the
14 responsibilities listed under "A-9" is that the position directly
15 assists the district's labor relations representative and prepares
16 labor relations cost-outs and other pertinent information
17 during/for the labor relations process. (See Exhibit R-1)

18 7. The credible testimony of Dr. Jean, reveals that Debbie
19 Michalik's position performs all the functions found in Section A
20 of the position description, although he could not give any
21 percentage breakdowns for work performed under Section A or Section
22 B. (Testimony Dr. Jean)

23 8. Incumbent, Debbie Michalik, prepares computer generated
24 analyses of the costs of various bargaining proposals used directly
25 in collective bargaining (cost-out sheets); has access to
26 confidential labor relations information, including personnel
27 files, application files and financial records; and she did
28 participate in the last round of collective bargaining between the
Association and the School District. She has not, however,

1 attended executive sessions of the Board of Trustees. (Testimony
2 Debbie Michalik)

3 9. Witnesses Sandy Bushek and Eleanor McCullough did not
4 have personal knowledge of all the duties being performed by
5 incumbent, Debbie Michalik, and could not attest to whether she
6 performed confidential labor relations duties as described in the
7 incumbent's position description. (Testimony Bushek and McCullough)

8 IV. DISCUSSION

9 The Montana Supreme Court has approved the practice of the
10 Board of Personnel Appeals in using federal court and NLRB
11 precedents as guidelines in interpreting the Public Employees
12 Collective Bargaining Act (the Act) as the state act is so similar
13 to the federal Labor Management Relations Act (LMRA). State
14 Department of Highways v. Public Employees Craft Council, 165 Mont.
15 349, 529 P.2d 785 (1974); City of Great Falls v. Young (Young III),
16 221 Mont. 13, 686 P.2d 185, 119 LRRM 2682 (1984).

17 "Confidential Employees" as defined in the Public Employees
18 Collective Bargaining Act are not statutory employees entitled to
19 the protection of the Act ([Section 39-31-103(9)(b) and (v), MCA,
20 (1993)]). In 1981 the United States Supreme Court affirmed the
21 NLRB's long-standing policy of narrowly defining "confidential
22 employees" as those who "assist and act in a confidential capacity
23 to persons who exercise 'managerial' functions in the field of
24 labor relations", NLRB V. Hendricks County Rural Electric
25 Membership Corp., 454 U.S. 170 (1981).

26 The Court found the Board had limited the "confidential
27 employee" category to those employees who assist and act
28 in a confidential capacity to persons who formulate,
determine and effectuate management policies in the field
of labor relations or who have regular access to
confidential information concerning anticipated changes

1 of labor relations or who have regular access to
2 confidential information concerning anticipated changes
3 which may result from collective bargaining, (citations
4 omitted). The Court concluded the Board's policy was
5 "rooted firmly in the Board's understanding of the nature
6 of the collective bargaining practice and Congress'
7 acceptance of that practice." 454 US. at 190. Mukamal
8 and Grenig, "Collective Bargaining: The Exclusion of
9 "Confidential" and "Managerial" Employees, 22 Duquesne
10 Law Review 1, (1983).

11 The Board of Personnel Appeals has consistently followed the
12 NLRB's narrow exclusion of "confidential employees."

13 [T]he criteria used by the Board of Personnel Appeals to
14 determine whether one is a confidential labor relations
15 employee should be those set forth in Siemens Corp, 224
16 NLRB 1579, 92 LRRM 1455 (1976). There the National Labor
17 Relations Board held that if the employee acts in a
18 confidential capacity, during the normal course of
19 duties, to a person who is involved in formulating,
20 determining and effectuating the employer's labor
21 relations policy, he or she should be excluded from any
22 appropriate unit. Lewis & Clark County v. MPEA, UC 4-79
23 (1980). See also American Federation of State, County
24 and Municipal Employees State Council No. 9 v. Havre
25 School District 16-A, UD #7-89.

26 The Board has made it clear that it follows the "narrow"
27 interpretation handed down by the NLRB, and not the "broad"
28 interpretation as urged by the School District. The NLRB
repeatedly has emphasized that the mere handling of or access to
confidential business or labor relations information, including
personnel and financial records, is insufficient by itself to
render an employee "confidential." Nor does the typing of
confidential labor relations memoranda suffice to imply
confidential status. (See Ernst & Ernst Nat'l Warehouse, 228 NLRB
590, 94 LRRM 1637 (1977) and U.S. Postal Serv., 232 NLRB 556, 97
LRRM 1062 (1977) and Reymond Baking Co., supra)

Here, the mere fact that the incumbent did not attend
executive sessions of the Board of Trustees does not, by itself,
negate the collective bargaining "nexus" of her duties and

responsibilities. In Reymond Baking Co., 249 NLRB 1100, 104 LRRM 1253 (1980), the NLRB concluded in part that the fact that a "relatively small percentage" of the employee's time is spent performing confidential duties does not detract from that employee's confidential status. And, the record reflects that incumbent Debbie Michalik did perform certain collective bargaining related duties of a confidential nature.

An examination of the responsibilities and duties performed by incumbent, Debbie Michalik, however, clearly reveals that this position specifically manages personnel folders and records, participates in negotiations, works with cost-out sheets, and other confidential labor relations information, i.e., incumbent was involved in the last round of collective bargaining between the Association and the school District.

The Association has, however, sent a clear message to the Board that it interprets the actions of the School District as an attempt to avoid having the new employee become a part of the bargaining unit. Nevertheless, the School District successfully rebutted such assertions by establishing on the record that they chose to interface such a position with the duties of labor relations and on-site bargaining. Moreover, there is nothing in the record that would support the Association's conclusion that the School District is limited to a single confidential employee.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction in this matter pursuant to Section 39-31-202, MCA. Billings Montana vs. Fire Fighters Local 529, 113 LRRM 324, 651 p.2d 627, Montana Supreme Court (1982).

2. The overall record reveals that it is not appropriate to include the position Personnel/Labor Relations Assistant-Secretary /Receptionist into the Classified Association at Florence-Carlton.

3. Additionally, the record herein does not reveal that the duties of incumbent Dorothy Rhodes as "the confidential Secretary to the superintendent" have changed; therefore, her employment status by definition continues to be a "confidential employee."

VI. RECOMMENDED ORDER

The Petitioner's request to include the position Personnel/Labor Relations Assistant-Secretary/Receptionist into the Florence-Carlton Classified Employee Association, MEA/NEA is Denied.

DATED this 22nd day of November, 1993.

BOARD OF PERSONNEL APPEALS

By:

Gordon D. Bruce

GORDON D. BRUCE
Hearing Examiner